IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NOTREDAN, LLC,
a Tennessee Limited Liability Company

Plaintiff,

v. **Civil Action No: 2:11-cv-02987**

OLD REPUBLIC EXCHANGE
FACILITATOR COMPANY
and REGIONS BANK

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT OLD REPUBLIC EXCHANGE FACILITATOR COMPANY'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendant Old Republic Exchange Facilitator Company ("Old Republic") submits this Memorandum of Law in Support of its Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and Local Rule 7.2 for failure to state a claim upon which relief may be granted.

I. INTRODUCTION AND FACTS

The Plaintiff, Notredan, LLC's ("Notredan"), Complaint against Old Republic alleges no set of facts from which this Court could grant Notredan relief against Old Republic. Notredan's central theory against Old Republic is that Old Republic is vicariously liable for the negligent acts of local attorney, David Johnson and David J. Johnson, P.C. ("Mr. Johnson").[1] Notredan claims that the negligence of Mr. Johnson in making the "huge mistake" of misplacing approximately $525,000.00 of Notredan's closing funds during an attempted real estate closing should be imputed to Old Republic. Mr. Johnson is not Old Republic's agent, thus Old Republic is not responsible for his improper actions. Regardless, even if Mr. Johnson is found to be Old Republic's agent, the contract Notredan claims controls in this matter completely absolves Old Republic from Mr. Johnson's misconduct. It provides:

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[1] As of September 9, 2011, the Tennessee Board of Law Examiners suspended Mr. Johnson's license to practice law in the State of Tennessee. (*See Notice of Suspension of the Tennessee Board of Law Examiners attached hereto as Exhibit "A"*).

> ***[Old Republic] shall not be liable to [Notredan] for any failures or delay in performance by*** . . . circumstances beyond the reasonable control of [Old Republic], including but not limited to ***[Mr. Johnson's] delay and/or failure to follow closing instruction and/or failure to perform***.

(*Dkt. 1, Compl. at ¶ 4 and Ex. "1" thereto at pg. 12, ¶ 21, Exchange Agreement, attached hereto as Exhibit "B"*). Thus, the Exchange Agreement states in plain language that Old Republic shall not be liable for Mr. Johnson's failures to perform. Notredan conveniently ignores this language here in its attempt to include Old Republic in its claim against Mr. Johnson, whose misconduct clearly caused Notredan substantial damages.[2] Mr. Johnson is to blame for Notredan's loss, not Old Republic. Notably, Notredan makes absolutely no allegation that Old Republic has possession or control of Notredan's funds or that Old Republic instructed Mr. Johnson to divert, conceal or otherwise misappropriate Notredan's funds. Assumedly, no such allegation can be made in good faith. Notredan's claims against Old Republic fail under the facts set forth in the

[2] In addition, Notredan is apparently aware that its loss is due solely to Mr. Johnson's actions, because Notredan has already successfully obtained a judgment against Mr. Johnson and his law firm for the exact acts alleged in this matter. Prior to the present action and on June 8, 2011, Notredan filed a complaint for damages against Mr. Johnson and his law firm in the Chancery Court of Shelby County, Tennessee, Cause No. CH-11-0978, *Notredan, LLC v. Johnson*, asserting that the defendants failed to perform their duty as the closing agent under the Exchange Agreement. (*A copy of Notredan's June 8, 2011, Complaint is attached hereto as Exhibit "C"*). Shortly thereafter, on July 19, 2011, Notredan filed a Motion for Judgment on the Pleadings seeking a judgment in the amount of $525,000.00 due to, among other things, Mr. Johnson's failure to perform. (*See Motion for Judgment on the Pleadings, attached as Exhibit "D" hereto*). The Chancery Court granted Notredan's motion, and on September 12, 2011, awarded Notredan a judgment against Mr. Johnson and his law firm in the amount of $525,000, together with pre- and post-judgment interest and costs. (*See Order of Judgment, attached hereto as Exhibit "E"*). The present matter appears to have been filed due to Mr. Johnson's inability to honor this judgment. Notwithstanding Notredan's misfortune in its dealings with Mr. Johnson, Notredan cannot and does not state a claim against Old Republic.

Complaint and the Exchange Agreement. No discovery is needed to determine whether Old Republic is responsible for Mr. Johnson's inappropriate acts.

In early 2011, Notredan desired to effect a qualified tax-deferred like-kind exchange of real property located in Tallahatchie County, Mississippi in accordance with Section 1031 of the Internal Revenue Code (a "1031 Exchange"). (*Dkt. 1, Compl.* ¶ *5*). Notredan alleges that on February 1, 2011, Notredan and Old Republic entered into an Agreement of Exchange of Real Property (the "Exchange Agreement") wherein the parties agreed that Old Republic would act as the "Qualified Intermediary" so that Notredan could affect the 1031 Exchange.[3] (*Exhibit "D" hereto*). Mr. Johnson was to be the closing agent (or closing attorney) pursuant to the Exchange Agreement. (*Exhibit "D" hereto at* ¶ *3*).

The primary basis of Notredan's claim is that Mr. Johnson negligently transmitted Notredan's funds into an incorrect bank account or Mr. Johnson's own trust account and that Notredan has been unable to retrieve these funds from Mr. Johnson. The Complaint provides:

> The sale of the Tallahatchie County property ultimately closed and the purchasers of that property wire transferred $525,000.00 into Mr. Johnson's trust account, pursuant to Mr. Johnson's instructions. Ultimately, Notredan was unable to purchase the adjoining property in Tennessee and so was unable to consummate the 1031 exchange. However, when Notredan contacted Mr. Johnson and made inquiry concerning the sale proceeds from the Tallahatchie County closing, Notredan was given several separate, conflicting and erroneous explanations until Notredan was finally told, by Mr. Johnson, that he had made a ***"huge mistake"*** and that the money he received as the closing agent from the sale of the Tallahatchie County property was wired by his office to either a bank in Montreal, Canada; a bank in New York City or to some third location but in any event on the erroneous belief that the funds were applicable to another, unrelated transaction.
>
> ***Upon information and belief, the funds which were actually wired into Mr. Johnson's IOLTA account at Regions Bank on February 11, 2011 were***

[3] Old Republic disputes the authenticity and enforceability of the Exchange Agreement in all respects and only accepts as true the allegations regarding the authenticity and enforceability of the Exchange Agreement for purposes of its Rule 12(b)(6) Motion to Dismiss.

> ***credited as a deposit on February 15, 2011. On that same day, Mr. Johnson deposited $1,400.00 of these proceeds into his business account as a fee and deposited $523,600.00 into a separate trust account at Regions Bank***. The $523,600.00 deposit at Regions Bank was on a check payable to Notredan, LLC but this check was not endorsed by Notredan, LLC but was nonetheless improperly honored and paid by Regions Bank to some payee other than Notredan, LLC.

(*Dkt. 1, Compl.* ¶¶ *6, 7*) (emphasis added). Notredan does not allege that its funds are in the possession of Old Republic or that Old Republic authorized Mr. Johnson to misappropriate Notredan's funds.

Instead, Notredan alleges that Old Republic is vicariously liable for Mr. Johnson's actions. Notredan states:

> Old Republic is vicariously liable for the negligence of David J. Johnson, P.C. for the mishandling of the sale proceeds . . . .
>
> * * *
>
> [A]s a direct and proximate result of the acts of negligence on the part of David Johnson which are imputed to Old Republic . . . the plaintiff has sustained loss of its sale proceeds [and other damages].

(*Dkt. 1, Compl.* ¶¶ *8, 11*).[4] Under the Exchange Agreement and under the facts alleged, which are that Mr. Johnson failed to perform his duties as the closing attorney of the 1031 Exchange, Old Republic cannot be liable for Mr. Johnson's actions. The Exchange Agreement specifically absolves Old Republic for Mr. Johnson's failures to perform. It provides:

> ***[Old Republic] shall not be liable to [Notredan] for any failures or delay in performance by*** . . . circumstances beyond the reasonable control of [Old Republic], including but not limited to ***[Mr. Johnson's] delay and/or failure to follow closing instruction and/or failure to perform***.

[4] Notredan also, surprisingly, alleges that Old Republic is "contractually liable for the breach of its fiduciary obligations under the contract." (*Dkt. 1, Compl.* ¶ *8*). However, Notredan fails to allege any conduct by Old Republic which would constitute a breach of contract or any particular provision of the Exchange Agreement allegedly breached by Old Republic. Further, Notredan alleges that Mr. Johnson diverted the funds to an improper bank account and that the funds were not used for their intended purpose. Old Republic, having never received the funds, had no duty or ability to act under the Exchange Agreement.

(*Exhibit "B" hereto, pg. 12, ¶ 21*). Plaintiff alleges specifically that Mr. Johnson, the closing agent, failed to perform by erroneously deposited Notredan's funds into an incorrect account without returning said funds upon demand. Under the Exchange Agreement, Old Republic "shall not" be liable for Mr. Johnson's actions in failing to follow Notredan's closing instructions and failure to perform the simple task of transferring the funds to Old Republic's escrow account to complete the 1031 Exchange. Accordingly, Notredan's Complaint fails and should be dismissed.

II. LAW AND ARGUMENT

A. Motion to Dismiss Standard

To survive a motion to dismiss, a complaint "must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 275-76 (6th Cir. 2010) (quoting *Tam Travel, Inc. v. Delta Airlines, Inc.*, 583 F.3d 896, 903 (6th Cir. 2009)) (internal quotation marks omitted). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the U.S. Supreme Court held that a complaint need not contain detailed factual allegations, but the plaintiff must provide grounds for entitlement to relief, and this "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. "The key inquiry is whether the facts in the complaint set out 'a claim to relief that is plausible on its face.'" *Whitney v. City of Milan*, 2010 WL 2671718, at *2 (W.D. Tenn. July 6, 2010) (quoting *Twombly*, 550 U.S. at 570); *see also Smith v. Breen*, 2010 WL 2557447, at *5 (W.D. Tenn. June 21, 2010) ("Factual allegation must be enough to raise a right to relief above the speculative level.").

In *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), the Supreme Court clarified that the analysis under Rule 12(b)(6) requires a two-pronged approach. First, the court should determine which allegations in the complaint can be classified as "legal conclusions" and disregard them for purposes of deciding the motion. *Id.* at 1949. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Second, the court should evaluate the remaining portions of the complaint—in other words, the well-pleaded facts—and ascertain whether they give rise to a "plausible suggestion" of a claim. *Id.* at 1950. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)); *see also Baptist v. Bank of New York Mellon*, 2010 WL 1539973, at *4 (W.D. Tenn. Apr. 16, 2010) (granting a motion to dismiss and holding that the complaint "fail[ed] to comply with the Federal Rules of Civil Procedure and the plausibility pleading standard announced in *Twombly* and *Iqbal*").

In this matter, taking the facts alleged in the Complaint as true, including the language of the Exchange Agreement, Old Republic cannot be held liable for Mr. Johnson's failure to perform his duties as a closing agent. Thus, Notredan's claim against Old Republic should be dismissed and Old Republic should be awarded its reasonable attorney's fees incurred in defending this action, pursuant to Section 17 of the Exchange Agreement. *See Exhibit "B"*, at p. 6, ¶17.

B. Notredan Fails to State Any Plausible Claim Against Old Republic Under the Clear Terms of the Exchange Agreement; Thus, The Complaint Should Be Dismissed.

1. The Exchange Agreement Does Not Establish That Mr. Johnson is Old Republic's Agent.

Notredan claims that, pursuant to the Exchange Agreement, Mr. Johnson was at all times acting in his capacity as the closing agent for Old Republic. The Complaint states: "Pursuant to the contract, Mr. Johnson was empowered to act on behalf of Old Republic pursuant to instructions which Old Republic did, in fact, provide to Mr. Johnson." (*See, Dkt. 1, Compl.* ¶ *5*).

The Exchange Agreement clearly does not provide, suggest or infer that Mr. Johnson is an agent of Old Republic. In fact, as stated above, the Exchange Agreement specifically provides that Old Republic is not liable for Mr. Johnson's actions.

Because the case at bar is a diversity action, the applicable state law concerning the principal and agent relationship applies. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (finding that in a diversity action, state substantive law governs). Furthermore, the party asserting the agency relationship bears the burden of proving the existence of an agency relationship. *Weaver v. Deverell*, No. W2011-00563-COA-R3-CV, 2011 WL 5069418 (Tenn. Ct. App. Oct. 26, 2011) (citing *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 653 (Tenn. 2009)). The Exchange Agreement provides that the laws of the State of California shall apply to matters of contract interpretation. *See Exhibit "B", Section 20.* Whether conducting the principal/agent analysis under California or Tennessee law, however, it is clear that no such relationship existed between Old Republic and David J. Johnson, P.C. or David J. Johnson.[5]

"An agency relationship may be created by a precedent authorization or subsequent ratification." *In re Joanna Gonda*, at p. 8, (citing CAL. CIV. CODE § 2307). A court should examine the conduct of, and relationship between, the involved parties, in determining the existence of an agency relationship. *Nave v. Life Bank*, 334 B.R. 586, 591-92 (M.D. Tenn. 2005) (citing *Harben v. Hutton*, 739 S.W.2d 602, 606 (Tenn. Ct. App. 1987)). Whether the principal exercised control over the agent is a key factor in an examination of agency. *Id.* (citing *White v.*

[5] Nonetheless, the instant case involves the construction of a contract. Similar to Tennessee, in California, "[t]he language of an instrument must govern its interpretation if the language is clear and explicit." *National City Police Officers' Ass'n v. City of National City*, (App. 4 Dist. 2001) (citing Cal. Civ. Code §1638). Here, the plain language of the Exchange Agreement makes it clear that Mr. Johnson was not the agent of Old Republic, and that in any event, Old Republic is absolved of any liability for the failure of Mr. Johnson to perform.

Revco Disc. Drug Ctrs., 33 S.W.3d 713, 723 (Tenn. 2000)). The principal's actual exercise of this control, rather than its mere right to control, is most important to this analysis. *Id.* The following factors should also be considered in evaluating the existence of agency: (1) the source of the alleged agent's compensation; (2) the party who first set the alleged agent in motion; and (3) the party whose interests the agent is working to advance. *Id.* (citing *Harben*, 739 S.W.2d at 607).

In Tennessee, a court "must focus on the extent of control exercised over the alleged agent in the performance of its work" when conducting an agency analysis. *Id.* (citing *Sodexho Mgmt., Inc. v. Johnson*, 174 S.W.3d 174, 178–79 (Tenn. Ct. App. 2004)). "If the purported principal controls only the *result* of the work, the alleged agent is more aptly termed an independent contractor, but the same entity is an agent if " 'the employer's will is represented by the *means*, as well as the result.'" *Id.* (citing *Sodexho*, 174 S.W.3d at 178–79 (emphasis added)). Importantly, one party's requirement that another party achieve specific results or follow particular standards does not create a principal-agent relationship. *Id.* (citing *Id.*) ("every contract for work to be done reserves to the principal . . . a certain degree of control because some degree of control is necessary to assure that the work is performed according [to] expectations or specifications"); *Greene v. Ellis* (*In re Ellis*), 152 B.R. 211, 218 (Bankr. E.D. Tenn. 1993) ("A requirement that work be performed according to standards and specifications imposed by an employer under a contract is not sufficient to establish the degree of control necessary to make a presumably independent contractor the agent of an employer."). Likewise, the principal is well-established in California that the right to control is the primary test of agency. *Housewright v. Pacific Far East Line, Inc.*, 229 Cal. App. 2d 259 (Cal. App. 1964) (citing *Cox v. Kaufman*, 77 Cal. App. 2d 449, 452, 175 P.2d 260 (Cal. App. 1946). The absence of the right to control "favors finding no agency relationship." *In re Joanna Gonda*, Case No. 10-58722, D.E. 74, p. 8 (Bankr. N.D. Cal. October 31, 2011), attached hereto as Exhibit "F", (citing *Tieberg v. Unemployment Ins. Appeals Bd.*, 2 Cal. 3d 943, 950 (1970) (the existence of a principal's right to control the agent's activities is the most significant factor in determining whether there is an agency relationship)).

The Exchange Agreement, which constitutes the sole basis of Notredan's claim that Mr. Johnson is Old Republic's agent, does not bestow to Old Republic the power of a principal over Mr. Johnson. [6] A simple review of the clear language of the Exchange Agreement reveals that the Exchange Agreement does not establish a principal/agent relationship between Old Republic and Mr. Johnson. First, the Exchange Agreement contains no language simply identifying Mr. Johnson as the agent of Old Republic. Section 3 of the Exchange Agreement identifies David J. Johnson, P.C. as the "Closing Agent" for the transaction, but this sole provision is obviously not an agreement between Old Republic and Mr. Johnson that could establish an agency. This provision does not discuss or mention Mr. Johnson's duties or any control that Old Republic may have or not have over Mr. Johnson. Moreover, David J. Johnson, P.C. and/or Mr. Johnson were not parties to the Agreement. The Exchange Agreement goes on to state provide that both Notredan and Old Republic would execute closing instructions to Mr. Johnson to effectuate the 1031 Exchange. It provides:

> The parties hereto and each of them covenant and agree to execute closing instructions to said Closing Agent consistent with the terms and provisions of this Agreement.

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[6] Notredan also makes the bare assertion that Mr. Johnson was an agent of Old Republic by virtue of "Section 1031 of the Internal Revenue Code and the treasury regulations promulgated thereunder." (Dkt. 1, Compl. ¶ 8). However, neither Section 1031 of the Internal Revenue Code or the Treasury Regulations promulgated thereunder discuss, analyze or comment on whether a closing agent/attorney, such as Mr. Johnson, is the agent of either the exchanger or qualified intermediary of a 1031 Exchange. (*See, 26 U.S.C. § 1031 and 26 C.F.R. §§ 1.1031-0 through 1.1031(k)-1, copies attached hereto as Exhibit "G"*). Thus, Notredan's claim that the Internal Revenue Code or applicable Treasury Regulations establish an agency relationship between Mr. Johnson and Old Republic is without merit.

See Exhibit "B", Section 3. Hence, *both* parties were to provide instructions to Mr. Johnson consistent with the Exchange Agreement, and Old Republic did not *control* the actions of Mr. Johnson. Given the express language of the Exchange Agreement, the absence of any language identifying Mr. Johnson as the agent of Old Republic, and the fact that Mr. Johnson was not a party to the Exchange Agreement, it is clear that Mr. Johnson *was not the agent* of Old Republic. Consequently, Notredan does not have a viable claim that the Exchange Agreement constitutes an express agency agreement between Old Republic and Mr. Johnson.[7]

2. Even If This Court Found An Agency/Principal Relationship Existed Between Mr. Johnson and Old Republic, Notredan's Claim Fails Nonetheless, Because Old Republic is Not Liable for Mr. Johnson's Misconduct Under the Clear Terms of the Exchange Agreement.

Regardless of whether Mr. Johnson is or is not Old Republic's agent, which he is not, the express language of the Exchange Agreement unconditionally precludes Notredan's claim against Old Republic. Notredan's prominent claim is that Mr. Johnson negligently transmitted Notredan's funds into an incorrect bank account or Mr. Johnson's own trust account and that Notredan has been unable to retrieve these funds from Mr. Johnson. The Complaint provides:

> ***Upon information and belief, the funds which were actually wired into Mr. Johnson's IOLTA account at Regions Bank on February 11, 2011 were credited as a deposit on February 15, 2011. On that same day, Mr. Johnson deposited $1,400.00 of these proceeds into his business account as a fee and deposited $523,600.00 into a separate trust account at Regions Bank***. The $523,600.00 deposit at Regions Bank was on a check payable to Notredan, LLC but this check was not endorsed by Notredan, LLC but was nonetheless

[7] Furthermore, because Notredan has asserted the terms of the Exchange Agreement as the sole basis for its claims against Old Republic, Notredan's complaint fails to assert a claim for agency by ratification. In order to establish agency by ratification, the "agent" must have purported to act on behalf of the principal. *In re Joanna Gonda*, at p. 11 (citing *Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App. 4th 952, 961-62 (2002)). Additionally, "[t]o be held liable for an agent's unauthorized act, a principal must also have knowledge of the material facts involved at the time of the alleged ratification." *Id.* (citing *Rakestraw v. Rodrigues*, 8 Cal. 3d 67, 74) (1972)). Notredan's Complaint does not allege that Old Republic had knowledge of Mr. Johnson's unlawful or negligent actions or that Mr. Johnson acted on behalf of Old Republic when he mishandled the sales proceeds. Therefore, Notredan has failed to state a claim for agency by ratification, and Old Republic cannot be held liable for the actions of Mr. Johnson.

> improperly honored and paid by Regions Bank to some payee other than Notredan, LLC.

(*Dkt. 1, Compl.* ¶ *7*) (emphasis added). Notredan then alleges that Old Republic is vicariously liable for Mr. Johnson's actions noted above. Notredan states:

> Old Republic is vicariously liable for the negligence of David J. Johnson, P.C. for the mishandling of the sale proceeds . . . .
>
> *   *   *
>
> [A]s a direct and proximate result of the acts of negligence on the part of David Johnson which are imputed to Old Republic . . . the plaintiff has sustained loss of its sale proceeds [and other damages].

(*Dkt. 1, Compl.* ¶¶ *8, 11*). Under the Exchange Agreement and under the facts alleged, which are that Mr. Johnson failed to perform his duties as the closing attorney of the 1031 Exchange, Old Republic cannot be liable for Mr. Johnson's actions. The Exchange Agreement specifically absolves Old Republic for Mr. Johnson's failures to perform. It provides:

> ***[Old Republic] shall not be liable to [Notredan] for any failures or delay in performance by*** . . . circumstances beyond the reasonable control of [Old Republic], including but not limited to ***[Mr. Johnson's] delay and/or failure to follow closing instruction and/or failure to perform***.

(*Exhibit "B" hereto, pg. 12,* ¶ *21*). Plaintiff alleges specifically that Mr. Johnson, the closing agent, failed to perform in that he erroneously deposited Notredan's funds into an incorrect account without returning said funds upon demand. Under the Exchange Agreement, Old Republic cannot be liable for Mr. Johnson's actions in failing to follow Notredan's closing instructions and failure to perform the task of transferring the funds to Old Republic's escrow account to complete the 1031 Exchange. Accordingly, Notredan's Complaint fails and should be dismissed.

3. Notredan's Direct Claim Against Old Republic Has No Basis in Fact or Law And Should Be Dismissed.

Notredan hints in its Complaint of a direct claim against Old Republic under the Exchange Agreement. Notredan states:

> In further breach of the terms of its contract with Notredan, Old Republic never notified Notredan of the fact that it did not receive the executed closing documents or the closing funds, nor did Old Republic notify Notredan that it simply "closed its file" when the funds were not received from its closing agent.
>
> * * *
>
> As a consequential result of Old Republic's breach of the contractual requirements set out above . . . the plaintiff has sustained loss of its sale proceeds, prejudgment interest, attorneys fees and costs.

(*Dkt. 1, Compl.* ¶¶ *6, 11*). Notredan's untenable claim that Old Republic breached the Exchange Agreement has no basis in the contract. The Exchange Agreement does not provide, discuss, or even mention duties imposed upon Old Republic in the unlikely event that a closing is not completed or effected due to circumstances beyond the control of Old Republic. In fact, the Exchange Agreement appears to specifically release Old Republic from such a scenario under the language discussed above, which provides:

> ***[Old Republic] shall not be liable to [Notredan] for any failures or delay in performance by . . . circumstances beyond the reasonable control of [Old Republic],*** including but not limited to Closing Agent's delay and/or failure to follow closing instruction and/or failure to perform.

(*Exhibit "B" hereto, pg. 12,* ¶ *21*). Thus, if Notredan's direct claim against Old Republic is one for the failure to notify, then Notredan's claim fails, because the Exchange Agreement specifically provides that Old Republic "shall not be liable to [Notredan] for any failures or delay in performance by . . . circumstances beyond the reasonable control of [Old Republic]." Here, it is alleged that Mr. Johnson unilaterally misappropriated Notredan's funds. Further, Notredan does not allege that its funds are in the possession of Old Republic or that Old Republic authorized Mr. Johnson to misappropriate Notredan's funds. Old Republic, having never received the funds, had no duty or ability to act under the Exchange Agreement. However, Notredan fails to allege any particular provision of the Exchange Agreement allegedly breached by Old Republic. Thus, Old Republic cannot be held liable.

III. CONCLUSION

For the reasons stated more fully herein, Defendant Old Republic respectfully requests that an order be entered dismissing Plaintiff Notredan's Complaint for Money Damages against Old Republic and that all costs be taxed against the Plaintiff, including Defendant Old Republic's reasonable attorney's fees pursuant to Paragraph 17 of the Exchange Agreement.

Respectfully submitted,

GLANKLER BROWN, PLLC

/s/ _Leigh Taylor White___
Don L. Hearn, Jr. #22837
Leigh Taylor White #25108
6000 Poplar Avenue, Suite 400
Memphis, Tennessee 38119
Telephone: (901) 525-1322
Facsimile: (901) 525-2389
dhearn@glankler.com

Attorneys for Defendant, Old Republic Exchange Facilitator Company

CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of December, 2011, a copy of the foregoing Memorandum of Law in Support of Motion to Dismiss Plaintiff's Complaint for Money Damages was filed electronically. I also certify that a true and correct copy of the foregoing was mailed to the following parties:

Robert L. Moore, Esq.
Heaton & Moore, P.C.
100 North Main Bldg., Suite 3400
Memphis, TN 38103

Randall D. Noel
Melody McAnally
Butler, Snow, O'Mara, Stevens & Cannada, PLLC
6075 Poplar Avenue, 5th Floor
Memphis, TN 38119

_/s/ Leigh Taylor White_________________________

4829-2163-1246, v. 1